State–Federal Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO THE STATE AND FEDERAL JUDICIARY

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Disclosure Rules Are Tested in State, Federal Courts

Federal Judge's Experiment With Proposed Disclosure Provisions Proves Successful

By Chief Judge William O. Bertelsman (E.D. Ky.)

Sweeping changes in the discovery rules are the most significant features of pending proposals to amend the Federal Rules of Civil Procedure. These new provisions, which would create disclosure obligations in addition to discovery, have been passed by the Judicial Conference of the United States and will become effective December 1, 1993, unless stayed by the Supreme Court or Congress.

Early on in the adoptive process I decided to try to find out for myself whether the objections that had been voiced against the proposals had any merit. So I implemented the committee's disclosure system in my own docket on an experimental basis.

The salient features of the proposed amendments are:

1. Without awaiting a discovery request a party must disclose:

a. the names, addresses, and telephone numbers of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings;

b. a copy or a description by category and location of all documents or tangible items relevant to such disputed facts;

c. an itemization of known damages;

d. insurance agreements.

2. The parties must hold an "early meeting" to make these disclosures and discuss a discovery plan and settlement.

3. The parties may stipulate out of all or any part of the disclosure system or the court may modify it or elect not to use it in a particular case.

4. Disclosures of expert lists, witness lists, and other matters are required closer to trial, similar to that now required by most judges in their pretrial orders.

5. In consideration of these disclosures, interrogatories are limited to 25 per party and depositions to 10 for all plaintiffs, 10 for all defendants, 10 for all third-party defendants, etc. A six-hour limit on depositions that appeared in earlier drafts has been deleted.

Extensive Hearings Held

Extensive hearings were held on these proposals. I was privileged to attend these hearings as a member of the Judicial Conference Standing Committee on Practice and Procedure and Liaison Member to the Advisory Committee on Civil Rules.

All segments of the bar and many classes of litigants were represented at the hearings. Much of the testimony was unfavorable. Some witnesses predicted that if this system is adopted the attorney–client relationship and the adversary system as we know them will be vitiated.

The Committees made several changes in the early drafts to alleviate some of the witnesses' concerns. Among these was tightening up the standard to require disclosure only of "discoverable information relevant to disputed facts alleged with particularity." This provision was inserted to meet the objection, primarily of products liability

See DISCLOSURE, page 4

Mandatory Disclosure, Arbitration Rules Dramatically Affect Arizona Litigation

by James G. Apple

The new Arizona rules of civil procedure, which include mandatory disclosure and arbitration provisions, have had a dramatic effect on the litigation process in that state.

William R. Jones, Phoenix attorney and chairman of the Arizona Supreme Court's Committee on Civil Abuse, Cost, and Delay, cited the following developments since the implementation of the new rules on July 1 of last year:

• two fewer judges handling civil cases in Maricopa County, which is the state's most populous county and includes the city of Phoenix;

• reduction in the caseload of judges handling civil cases in Maricopa County by 200 cases per judge;

• more frequent settlement of all types of cases;

• 9 out of 10 non-settled cases going to arbitration and only one out of the 10 continuing after arbitration;

• an average case disposition time of 13 months for cases going to trial;

• an average case disposition time of 4–6 months for cases going to arbitration; and

• discovery motions reduced to "almost nothing."

Arizona is the first state court system to adopt and put into place civil rules substituting disclosure for discovery and mandating arbitration. The new rules also include other provisions designed to reduce cost and delay in civil litigation.

A key component of the new rules, Rule 26.1, requires attorneys for all parties in a civil case, within 40 days of filing an initial pleading, to disclose or identify the following:

• the factual basis for each claim or defense;

• the legal theory underlying each claim or defense;

• witnesses expected to be called at trial and the subject matter of their testimony, including expert witnesses;

• all persons who may have knowledge of the case;

• all persons who have given statements;

• computation of damages for all damage claims;

• witnesses and documents supporting all damage claims;

• all tangible evidence and documents that may be used at trial;

• all relevant insurance agreements; and

• documents relevant to the subject matter of the case or which might lead to discoverable evidence.

Under Rule 26.1, continuing disclosure is a duty of counsel for all parties. Amended disclosure must be made within 30 days of discovery of new information or documents.

Other parts of the new rules limit length of depositions to 4 hours except with a judge's permission or agreement of the parties, limit the number of experts to one per side per issue, limit the number of interrogatories to 40, require arbitration in cases involving less than $30,000, and give trial judges power to penalize lawyers for violations of the rules. The threshold value for cases excused from arbitration will be increased to $50,000 on July 1, 1993.

Proponents of the new rules estimate the savings of discovery costs to litigants to be between one-half and two-thirds of the costs

See ARIZONA, page 4

Oklahoma Moves to Establish Three New State–Federal Judicial Councils

State and federal judges in Oklahoma have taken the first steps toward creating three new state–federal judicial councils, one in each federal judicial district in that state.

Spearheading these efforts are Chief Judge Ralph Thompson (U.S. W.D. Okla.), Judge Robin J. Cauthron (U.S. W.D. Okla.), and Chief Justice Ralph Hodges (Okla. Sup. Ct.).

Chief Judge Thompson has designated Judge Cauthron, Judge Lee West (U.S. W.D. Okla.), Bankruptcy Judge John TeSelle (W.D. Okla.), and Magistrate Judge Bana Blasdel (W.D. Okla.) as the federal participants in the Western District Council.

Representing the federal judiciary in the Eastern District Council will be Chief Judge Frank Seay (E.D. Okla.) and Magistrate Judge Jim Payne (E.D. Okla.). In the Northern District Council Judge Stephanie Seymour (U.S. 10th Cir.) and Chief Judge James Ellison (U.S. N.D. Okla.) will be the federal representatives.

The Supreme Court of Oklahoma voted unanimously to support the three judicial councils. Chief Justice Hodges will name the state representatives to each council.

Tentative plans call for each council to meet twice a year. One combined meeting of all three councils will be held in the fall of each year during the annual meeting of the Oklahoma Bar Association.

Judge Cauthron was a member of the delegation of three judges from Oklahoma attending the National Conference on State–Federal Judicial Relationships in April, 1992, in Orlando, Fla., which stressed the value of state–federal judicial councils. ❑

Three National State–Federal Bodies Meet; Discuss Legislative Proposals Affecting State and Federal Courts

Judge Peter T. Fay (U.S. 11th Cir.), left, and Chief Justice Harry L. Carrico (Va. Sup. Ct.) chair the National Judicial Council of State and Federal Courts, which met in January. The Council received reports at the meeting on violence in family cases and the content and status of the bankruptcy education program conducted by the American Bankruptcy Institute.

January meetings of three national state–federal judicial organizations centered on federal legislative proposals that could affect the jurisdiction, caseloads, and actions of state and federal courts.

The U.S. Judicial Conference Committee on Federal–State Jurisdiction and the National Judicial Council of State and Federal Courts met in San Diego on January 15 and 16, respectively, and the Committee on State–Federal Relations of the Conference of Chief Justices met in Williamsburg, Va., on January 25.

The Federal–State Jurisdiction Committee and the Chief Justices' state–federal committee focused on violence against women legislation, which failed to pass in the last session of Congress but has been reintroduced in both houses of the current Congress.

The Judicial Conference Committee also discussed the omnibus crime bill that did not pass in the last Congress but is expected to be reintroduced again in the current session. The two committees examined a proposal to revise diversity jurisdiction by excluding federal jurisdiction over cases involving in-state plaintiffs but no specific action was taken by either group.

Thomas A. Henderson, Washington liaison of the National Center for State Courts, told the National Council of State and Federal Courts that the increased attention being given by state courts to violence in families could cause a major redirection of their resources, with the courts becoming social service providers in such areas as enforcement of child support orders and court-directed counseling and probation services.

Idaho attorney Ford Elsaesser also spoke to the National Council on the impact of bankruptcy law on state courts and the education program of the American Bankruptcy Institute, which assists both state and federal judges in understanding bankruptcy issues, especially the effects of bankruptcy stays on state court decisions. ❑

Inside . . .

State–Federal Coordination Nationwide Is Goal in Breast Implant Litigation

Breast implant litigation has provided the opportunity for what one federal judge has called "the largest federal–state coordination of litigation ever undertaken by the courts."

Chief Judge Sam C. Pointer (N.D. Ala.) is the coordinating judge, under an assignment by the U.S. Judicial Panel on Multi-District Litigation, for all federal cases involving claims against manufacturers of breast implant devices and materials.

In addition to issuing a comprehensive case-management order for the coordination of the federal cases, Judge Pointer has met with state judges on the Mass Tort Litigation Committee of the Conference of Chief Justices to coordinate state cases throughout the country.

One of the innovations of this cooperative effort is the creation of a national electronic bulletin board for notices and information about current activity in the litigation nationwide. The CCJ mass tort committee is encouraging state courts to establish similar electronic bulletin boards in those states with a significant number of breast implant cases that would relate only to the particular state.

The comprehensive case-management order issued by Judge Pointer last September provided for the following:

- national liaison counsel for both plaintiffs and defendants;
- master pleadings, including "master complaints" and "master answers";
- a national joint document depository in Cincinnati, Ohio;
- a master numbering system for all documents produced in the litigation;
- a master schedule for depositions of national defendants, national experts, and treating and consulting physicians; and
- a master set of interrogatories.

Judge Pointer appointed Professor Francis McGovern of the University of Alabama Law School as a special master to assist in the state–federal coordination of the cases. ❑

Three New Bills May Affect Federal Court Criminal Caseloads

Three new pieces of legislation passed by the 102nd Congress may affect the criminal caseloads of federal courts.

The "Child Support Recovery Act of 1992" (Pub. Law 102-521) creates a new federal crime for failure "to pay a past due support obligation with respect to a child who resides in another State . . . ." Punishment for a first offense under this new law is a fine or imprisonment not to exceed 6 months, or both.

A basic purpose of the "Anti-Car Theft Act of 1992" (Pub. Law 102-519) is, in the words of the statute, "tougher law enforcement against auto theft," particularly "carjacking.". The act provides penalties for a new crime of theft of an automobile accompanied by possession of a firearm, and increased penalties for importation or exportation of stolen vehicles and trafficking in stolen vehicles.

The third bill is the "Animal Enterprise Protection Act of 1992" (Pub. Law 102-346), aimed at "animal enterprise terrorism," i.e., causing physical disruption of commercial or academic enterprises that use animals for research or food production or of other organizations that house or use animals, such as zoos, aquariums, and circuses. Penalties include fine or imprisonment or both. ❑

Notice

The proceedings of the April 1992 National Judicial Conference on State–Federal Judicial Relationships have been published in the November 1992 issue of the Virginia Law Review (78 Va. L. Rev. 1657). Copies of this issue may be obtained by writing to The Virginia Law Review, University of Virginia Law School, Charlottesville, VA 22901. The cost is $9.00 per copy.

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A note to our readers

The *State–Federal Judicial Observer* welcomes comments on articles appearing in it and ideas for topics for future issues. Edited versions of letters may be printed by the *Observer* with the permission of the author.

The *Observer* will consider for publication short articles and manuscripts on subjects of interest to state and federal judges. Decisions concerning publication of a submitted article will made by the editorial staff.

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Judicial Education and Judicial Skills for State and Federal Judges—A Syllabus

by Judge William W Schwarzer (Director, Federal Judicial Center)

Good judges possess certain basic skills, no matter in what legal system they work. Judicial training should help judges acquire and improve those skills. This syllabus is intended as a guide to assist in developing basic skills training.

General Statement About Judicial Training Curriculum

Judicial education and training should cover three areas:

- Proficiency/competence
- Performance/conduct of duties
- Productivity/work load

Judicial education and training should have four objectives:

- Imparting knowledge
- Improving skills and techniques
- Establishing values and standards
- Developing a judge's sense of responsibility

Skills for Case Management

A. Judges should be able to manage the cases before them to bring them to a just, speedy, and economical resolution. Some of the skills involved are these:

- Taking necessary action when presiding over a case to ensure that all parties are prepared to proceed, that the trial begins on schedule, that parties have a fair opportunity to present their cases, and that the trial proceeds to conclusion without unnecessary interruptions.
- Organizing each case at the beginning to identify the critical questions and focus the lawyers' work on those questions, to avoid wasteful activity and delay.
- Maintaining papers and files in cases in an organized and orderly way, so that they can be found when needed.
- Preparing in advance for a trial or hearing—by studying the file, the facts, and the law—so that the case can move without delay.
- Paying attention while the trial or hearing is going on, listening to the lawyers and witnesses, and making sure that the judge and the attorneys understand the questions to be decided and the evidence being presented.
- Performing judicial duties diligently, including making decisions as promptly as possible.
- Keeping the proceedings moving forward to decision, and not permitting delay, digression, or wasting of time by lawyers or witnesses.
- Assisting the parties to disputes, when appropriate, to find ways to arrive at an agreed settlement.

Control of Proceedings

B. Judges should control the proceedings before them so that they will be orderly and fair. Some of the skills involved are these:

- Conducting trials and proceedings in a dignified way so that all participants will feel that they are taking part in the administration of justice.
- Preventing and promptly stopping disruptive or disrespectful behavior in court.
- Treating all lawyers, parties, and witnesses courteously, observing ethnic, racial, and gender fairness, and insisting that all others do the same.
- Hearing all sides before making a decision.

C. Judges should know their powers under the law and should exercise them fully, but not exceed them.

When judges are asked to make an order or decision, they should first determine whether there is jurisdiction (i.e., whether the judge has authority under the law to make it).

When the law gives the judge the authority to make an order or decision, the judge should not be afraid to use that authority as the law and the evidence may require, even if to do so may be unpopular and expose the judge to criticism.

Judges should not permit themselves to be intimidated or influenced by others and should decide the case solely on the basis of the law and the evidence.

Understanding Elements of Fair Trial

D. A judge should understand the basic elements of a fair criminal trial. These may include:

- Informing the defendant of the charges against him or her.
- Treating the defendant as innocent until proved guilty.
- Permitting or requiring that the defendant be represented by an attorney.
- Protecting the defendant against searches other than in conformity with law, giving the defendant an opportunity to hear all of the opposing evidence and to confront and cross-examine the witnesses against him or her.
- Protecting the defendant against having to incriminate himself or herself.

Understanding Ethical Duties

E. A judge should understand the ethical duties of a judge. These include:

- Being, and always appearing to be, fair and impartial and free from any bias, not taking sides or seeming to favor one side over the other.
- Not permitting himself or herself to be influenced by anyone in making orders or decisions.
- Not discussing cases before the judge with others (in particular avoiding ex parte communications) or making public comments about such cases.
- Not hearing cases in which the judge has a financial or personal interest, or in which it might reasonably appear to others that he or she cannot be fair.
- Not engaging in other activities that might raise a question about the judge's impartiality, such as taking part in political activities or taking sides or expressing opinions on matters that may come before the judge.

F. Judges should develop skills that will help them become and remain competent. These include:

- Being able to write and speak accurately and well, and make themselves easily and correctly understood.
- Studying the law that applies to each case the judge has to decide.
- Continuing the study of law to keep up with changes and new laws.

Managing Relations

G. Judges should manage their relations with other persons and the public generally. This includes:

- Maintaining a collegial, courteous, and respectful relationship with other judges, and not criticizing other judges in public.
- Developing a good working relationship with the clerical staff and others working in his or her court, treating them fairly and with consideration, and seeing that they perform their duties properly and promptly.
- Avoiding public controversy over criticism of a judge, or of a judge's decisions, or of the courts generally.
- In public matters concerning the courts, acting with dignity and restraint so as not to undermine public respect for the courts.
- Always conducting themselves to instill confidence in others in the administration of justice. ❑

State–Federal and Interstate Cooperation, Case Management Techniques Move Complex Litigation, Hasten Disposition of Asbestos, Other Cases

by Judge Sandra Mazer Moss
(Pa. Ct. of Com. Pls.)

(Judge Sandra Mazer Moss manages the complex litigation center in Philadelphia, which was featured in the last issue of the State–Federal Judicial Observer. *In this article Judge Moss discusses the methods used at that center in the disposition of complex cases assigned to it.)*

Managing the tremendous backlog of asbestos cases in Philadelphia has been a monumental undertaking. When I became asbestos calendar judge in October 1988, only 135 cases had been completed that year. We had a backlog of over 7,000 cases. Each month more cases were filed than disposed of and the backlog correspondingly increased.

It has been said that "fear is a great motivator." In October 1988, I was the most motivated judge on the Court of Common Pleas of Philadelphia County.

In 1992 we disposed of over 1,600 cases and our backlog dropped to under 5,000 cases. Today instead of 135 cases per year we dispose of 175–200 cases per month and in 1995, if our current production rate continues, there will be no asbestos backlog in Philadelphia County. Litigants will receive trials in 18 months to two years in accordance with American Bar Association standards.

This article will discuss how we accomplished this feat. I will discuss two areas: state/federal and interstate cooperation, and case-flow management.

State–Federal and Interstate Cooperation

Mass torts span all state and federal courts. State, federal, and interstate cooperation are essential to reduce case backlog. Senior U.S. District Judge Charles Weiner (U.S. E.D. Pa.) handles all federal asbestos cases through an MDL assignment. Together we meet informally to share ideas, coordinate strategies, combine joint settlement packages, promulgate similar rules, and present a united front to the asbestos bar nationwide.

Judge Weiner was also instrumental in spearheading interstate cooperation. He brought together Judge Marshall Levin (Md. Cir. Ct.), Judge Helen Freedman (N.Y. Sup. Ct.), and me to organize an ad hoc state judges cooperative effort. Eleven state court judges from Maryland, New York, Pennsylvania, California, Washington, Colorado, Minnesota, Michigan, Louisiana, and Florida met for the first time in Washington, D.C., in January 1991, and formed the state judges asbestos litigation committee.

Judge Sandra Mazer Moss of the Court of Common Pleas of Philadelphia County and calendar judge for the complex litigation center in the historic Wannamaker Building in Philadelphia.

The committee, which now includes 19 judges from 17 states, subsequently became a subcommittee of the Conference of Chief Justices funded by the State Justice Institute and managed by the National Center for State Courts. Its mandate was recently expanded and it is now known as the Mass Tort Litigation Committee solving problems not only in asbestos litigation but also in lead paint, breast implant, DES, and L-Tryptophan litigation.

Where is the jurisdiction and precedent for 19 judges from 17 states to meet and tackle common litigation problems which plague their separate courts? They arise only from dedication and commitment to solving the monumental problems of asbestos and other mass tort litigation. In short, the tasks are accomplished on a handshake and a desire to cooperate.

The committee has several functions, including coordinating discovery, trial schedules, and case-management techniques; finding alternatives for "the race to the courthouse"; standardizing procedures; creating performance standards; disseminating information; creating a communications network; and coordinating with various federal judges handling mass tort litigation.

Most recently the committee has been working with Chief Judge Sam Pointer (U.S. N.D. Ala.) to organize and coordinate the silicone breast implant litigation. State and federal judges are developing joint case management orders, national document and deposition depositories, joint discovery depositions, and trial dates to avoid the problems of asbestos litigation.

In addition, the committee members are writing informational papers, speaking before organizations and institutions, such as the Conference of Chief Justices and U.S. Senate and House Judiciary Committees, and planning a national conference on lessons to be learned from asbestos litigation.

Most important, the state judges are establishing an ongoing working relationship with the federal courts to create a truly cooperative effort.

Case-Flow Management

There are several components essential to successful case-flow management. They are:

1. Open communication between bench and bar—Asbestos lawyers meet informally for breakfast with the court three times a month. By agreement of all counsel, one meeting is for plaintiffs, one is for defendants, and one is a joint meeting. Together we tackle current problems, revise rules, and develop case-management strategies. It is essential for the attorneys to "own a piece of the program," i.e., to help construct the program and thus to have an interest in its success.

2. No formal case management order—I believe in not issuing formal orders relating to the management of cases. This gives me the flexibility to experiment with novel approaches.

3. Consolidation—Cases are consolidated into groups of 10. We never try a single case in our litigation center because our backlog does not permit the time or money to try only one case. Cases are grouped by plaintiffs' firms and by disease. The categories include: (a) non-malignancies (pleural thickening and asbestosis); (b) lung cancer; (c) mesothelioma; (d) upper cancers (esophageal, mouth, brain, etc.); and (g) lower cancers (gastrointestinal). The attorneys group their own cases and groups are coordinated by the court.

4. Reverse bifurcation—Cases are essentially tried backwards. Damages are tried first. Liability is tried second. As a practical matter liability is almost never tried. The parties stipulate to liability or agree to resolve it without a jury. Accordingly reverse bifurcation tends to establish values and settle cases.

In reverse-bifurcated trials punitive damages and cross claims are deferred. To lower costs and save time, the parties informally agree to give up punitive damages, cross-claims and liability as a "quid pro quo" solution to long delays. The consolidated reverse-bifurcated cases can be tried in 5 days.

5. Voluntary pleural registry—To deal with younger asymptomatic plaintiffs a voluntary pleural registry has been established. Such claims are dismissed without prejudice, to be reopened on an expedited basis if the plaintiff develops asbestos-related cancer.

6. Regulated case flow—A specified amount of cases are disposed each month. In 1988 the quota was 25 single cases per month. In 1992 the quota was 20 groups per month (175–200 cases). If 20 groups settle the first day of a month, the list shuts down until the next month.

7. Streamlined motion practice—Motions are heard at the call of the list every Monday morning. Discovery motions are heard orally and all rulings are made from the bench. All other motions are submitted by letter briefs within a one-week time frame. Paper is eliminated and transaction costs are greatly reduced.

8. Firm trial dates—Each month's quota of cases receives a firm trial date. No continuances are granted except for serious illness or family emergencies. Firm trial dates enable the parties to plan strategy and engage witnesses.

9. Senior judge power—Firm trial dates for 20 groups of consolidated cases is difficult to establish. It is accomplished by using the wisdom and experience of 7 or 8 senior trial judges. Together we completed 1,128 cases in 6 months. Seven judges can bring 70 cases to trial simultaneously. Because attorneys have difficulty preparing 70 cases for trial simultaneously, most matters settle.

10. Complex litigation center—A special litigation center has been created to handle these and other complex cases. ❑

Special Seminar for State Judges Helps Relieve Tensions From Bankruptcy Stays

Chief Justice William H. Rehnquist noted in a speech last year that at the April 1992 National Conference on State–Federal Judicial Relationships in Orlando, Fla., "the work of the bankruptcy courts was widely recognized as the major friction point" between state and federal court systems.

The number of bankruptcy filings has grown dramatically in the last decade and with it the potential for conflict between federal bankruptcy proceedings and state court processes in such areas as domestic relations and criminal restitution.

To help resolve tensions between state and federal courts arising from the issuance of bankruptcy stays, the American Bankruptcy Institute is presenting a traveling seminar designed especially for state judges.

"Bankruptcy Issues for State Judges" includes an introductory discussion by a panel of bankruptcy experts who outline specific problems encountered by state judges and suggested methods of dealing with them. Interactive discussions between panelists and attendees follow the panel presentation.

Each seminar lasts 4–5 hours and is cost effective because it is usually given during established judicial meetings or conferences.

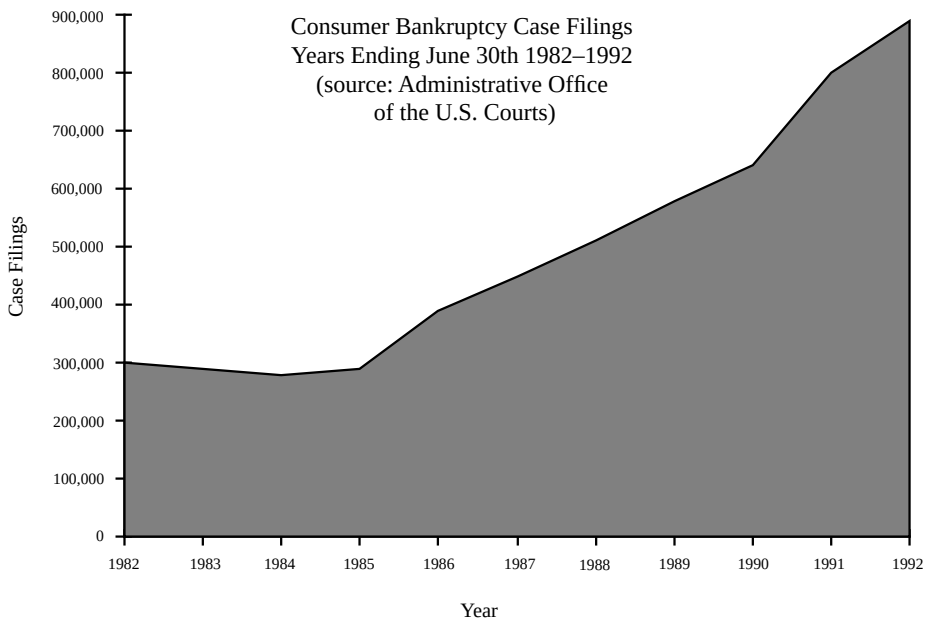
A deskbook of materials, specifically developed by ABI for the seminar and issued to each seminar participant, is organized by bankruptcy topics and oriented toward practical solutions rather than academic analysis.

Last year the seminar was presented in 11 states: Alabama, Alaska, Arkansas, Georgia, Idaho, Mississippi, New Mexico, New Jersey, New Hampshire, Ohio, and Texas. One regional seminar covered the five-state area of North Dakota, South Dakota, Montana, Idaho, and Wyoming.

During 1993, the seminar is scheduled to be presented in 10 states: Connecticut, Florida, Maryland, Massachusetts, Missouri, North Dakota, Pennsylvania, Rhode Island, Tennessee, and Washington. One regional seminar for judges in a 2–3 state area is also planned.

Judges and court administrators interested in scheduling or attending an ABI seminar can contact Sam Gerdano, Executive Director, American Bankruptcy Institute, 510 C Street, N.E., Washington, DC 20002, telephone (202) 543-1234. ❑

Bankruptcy Filings Increase Dramatically



In the decade 1982–1992 the number of bankruptcy filings in the United States almost tripled. The growth in the number of filings is significant for state–federal judicial relations, because the effects of bankruptcy stays are a continuing source of tension between federal and state court systems.

Focus On: Historic Courthouse

The courthouse in Greensburg, Green County, Kentucky, is the oldest standing courthouse west of the Allegheny Mountains. It was built in the years 1802–1804 of native limestone, with walls 22 inches thick. The building served as a courthouse until 1931, when court operations were moved to a new structure. The building was occupied for many years thereafter by the Green County Library. In 1972 it was restored by the Green County Historical Society and listed on the National Register of Historic Places. The building is now used for community purposes. Photo courtesy of the Kentucky Administrative Office of the Courts.

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defendants, that frequently it was unclear from the complaint what the plaintiff's theory actually was, so one would not know what to disclose. Despite attempts to meet the objectives, predictions of catastrophes of apocalyptic proportions continued to be made.

When I started the experiment with the new disclosure provisions in my own court, frankly I was expecting the worst in the light of all of these prophecies of doom. I fully anticipated being "mandamused" to the Sixth Circuit if I attempted to enforce the disclosure rules.

Disclosure Taken in Stride

None of the cataclysms materialized. The attorneys seemed to take disclosure in stride. When enough time had passed that we started having some status conferences, we got favorable feedback. Most important, I remained "unmandamused."

We used three versions of the disclosure rule in the course of the committees' adoption of successive drafts. The committees had spent many days discussing various standards for disclosure. It turned out not to make much difference what the standard was. The lawyers seemed to know instinctively what they were supposed to disclose and disclosed it without a lot of fuss.

Instead of the deluge of discovery motions predicted by the witnesses at the hearings, we only had one or two. Only one involved privilege. As far as I could tell, the attorney–client relationship continued much as before, as did the adversary system.

In preparing to write this article, I asked my law clerks to conduct an admittedly unscientific poll of the local bar members to get their reactions. The response of almost everyone was positive. Certainly the disclosure system did not solve all problems, but most attorneys felt that it was effective in reducing cost and delay.

We have also made calls to several districts where a disclosure system has been in effect as part of a Civil Justice Reform Act plan. According to these contacts, experience with disclosure in these districts has been favorable also.

Some haggling is still going on with regard to questions of what has been pled "with particularity." (I recall that some of the committee members thought resurrecting this ancient ghost of pleading niceties was a mistake.)

General Consensus of Lawyers Favorable

My law clerks report that the general consensus of the lawyers polled was that the disclosure system should be adopted. Aside from some practical problems, those polled believe the goals achieved outweighed the disadvantages. The greatest criticism was a lack of sanctions for failure to comply, and a need for a clearer definition of the type of information to be disclosed (this problem seems to be inherent). No one polled mentioned any privilege problems caused by the requirement to disclose unfavorable information or any problem with the number of depositions.

In retrospect, I believe it is the early meeting requirement that makes the disclosure system work. If the attorneys have to start by getting together and discussing what the case is really about, instead of firing off a barrage of interrogatories and deposition notices at each other, a much more cooperative spirit seems to result. After 14 months of the experiment, we have had only one motion for sanctions for failure to disclose.

As I stated above, I approached the disclosure system with great skepticism. I expected my experiment to justify my vote against adopting disclosure. Instead I have become a convert. I will probably keep the system as a local order, even if the disclosure amendments fail further along in the rules process. ❑

State, Federal Courts Cooperate in Prospective Juror Selection and Jury Service Programs

by G. Thomas Munsterman (National Center for State Courts) and David Williams (Administrative Office of the U.S. Courts)

State and federal clerks and court administrators in many states are taking part in cooperative methods of juror selection that provide greater citizen participation in jury service and help ensure that potential jurors adequately represent a cross-section of the communities served by state and federal courts.

Sources of Prospective Jurors

The current trend is to broaden representation among prospective jurors by drawing names from merged lists of voters and licensed drivers. State courts in all or part of at least 28 states use this method. State courts in 6 states use only licensed driver lists, and 12 states and a majority of federal courts use only voter lists.

The U.S. District Court in Colorado has been using a merged voters and drivers list supplied by the state since 1974. The federal court requests from the appropriate state agency a specific number of names from each group of counties encompassed by the different divisions of the court. The state randomly selects the names and supplies them to the court on a computer tape. The state does not screen the names for prior federal court service. The expense to the court is only the cost of the computer tape.

Ten other federal district courts use voter and driver lists supplied by the state, either in pre-merged form or for merging after receipt. The federal courts using the combined lists are the Northern District of California, District of Columbia, Hawaii, Central District of Illinois, Eastern and Western Districts of Michigan, New Hampshire, Eastern District of New York, Middle District of Tennessee, and Northern District of Texas.

In New Jersey each county (vicinage) merges its voter and driver lists, and the federal court obtains these lists from the individual counties.

Advantages of Combined Lists

There are several advantages to using a combined voter and driver list:

• Random selection from a combined source list will more adequately represent the population served by the particular court. Voter lists usually under represent the young, some minorities, and those in transit, while driver lists might exclude the elderly and the poor. A combined voter–driver list also includes persons who do not register to vote to avoid jury service.

• Combined lists will more likely contain "all qualified persons." Also, the greater the size of the list the greater the distribution of both the educational benefits and the time burdens.

Exemptions for State or Federal Service

Another example of state–federal cooperation in jury processing is recognizing service in one court as a valid exemption for or excuse from service in the other. This gives those who have taken the time to serve a respite from having to serve again too soon and distributes jury service across a greater portion of the population, thereby enhancing community representation.

Most state and federal courts recognize jury service within the last two years as grounds for excuse from serving.

Many state courts have a one day/one trial term of service for jurors, which results in the use of many jurors. Recognition of such abbreviated service in a state court by a federal court could result in significantly reduced lists of eligible jurors for federal court service. Thus some federal courts in the states that have such short terms of service do not recognize state jury service as an excuse from federal court service. ❑

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under the previous system of discovery.

The rules were originally proposed by a special state bar committee appointed to study civil litigation by the Supreme Court of Arizona in March, 1990. The committee reported in September 1990, and the proposed new rules were then tested in a yearlong pilot program in the Maricopa County Superior Court. They were approved by the Arizona Supreme Court on December 20, 1991.

Jones said his 20-member committee held a public hearing on the new rules on March 6 of this year. The purpose of the hearing was to determine reactions to the rules and "fine tune" them.

The hearing, according to Jones, revealed that "overall the rules have been received quite well. Most of the lawyers seem to be acclimating themselves to the new provisions."

"And they are definitely cutting back on litigation costs," he added.

Jones said that although most of the comments at the hearing were favorable, some were not. The lawyers most concerned were those who practice in the domestic relations area. They argued that the disclosure rules, when applied to domestic relations cases, "tended to exacerbate an already volatile situation" and recommended that there be "limited disclosure up front" to reduce the amount of "fuel on an already blazing fire," referring to the tension between parties that often exists at the time of the filing of a domestic relations case.

Some of the lawyers testifying at the hearing also commented that the disclosure rules created a "front-end loading of costs" because of the need to gather all of the required information at the beginning of a case. But Jones said that such a result was intended. He concluded that the value of the disclosure rules in getting all relevant information in a case "out in the open" at an early date and encouraging settlement or early disposition more than compensated for these increased "front-end" costs. ❑

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